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*Doug Horswill*



*A Subsidiary of Cominco American Incorporated*

Date: December 7, 1999  
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Pages: 4 w/cover

Cc: Chuck Findley  
Julie Mathews  
Cam Leonard

**Message:**

John Key and Doug Horswill asked me to forward the attached legal opinion to you. I understand that at your meeting the view was expressed that EPA might be required to issue a section 167 administrative order as a condition to bringing an enforcement action under that same section. John and Doug thought this was important and asked our counsel to research it thoroughly and to provide us with a letter on the subject. The letter is attached.

The letter concludes that there is no requirement to issue a section 167 order as a condition precedent to filing an enforcement action in a federal district court. As a result, there is no disadvantage to EPA in pursuing other means of resolving its differences with the state and Cominco subsequent to the issuance of the permit. As you know, SCR can be retrofitted to MG-17 if EPA's current view were to prevail in that process.

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December 6, 1999

**VIA FACSIMILE**

Mr. John Key  
General Manager - Red Dog Operations  
Cominco Alaska Incorporated  
Red Dog Mine  
P.O. Box 1230  
Kotzebue, Alaska 99752

Re: **EPA Authority To Bring Enforcement Action In Federal  
District Court Under § 167 Without Prior Issuance Of  
Administrative Order**

Dear John::

This letter addresses an issue that we understand was presented during your meeting with EPA Regional Administrator Clarke and Deputy Regional Administrator Findley. Apparently, the view has been expressed that unless EPA issues an administrative order under Section 167 of the Clean Air Act to prohibit the PRI from proceeding, it might lose its ability to seek injunctive relief in the U.S. District Court or take other enforcement action. You have asked us to evaluate EPA's concern, and to provide you with our analysis of whether that concern may be valid. For the reasons explained below, we believe EPA's fears are misplaced. The statute, quoted below, is clear and unambiguous on its face, and does not require the issuance of an order as a condition precedent to bringing an action for injunctive relief or penalties in federal district court. After diligent research and investigation on the issue, we find that there is legal basis or authority that would require EPA to issue a Section 167 order as a prerequisite to seeking injunctive relief or taking other enforcement action.

In our view, Section 167 does not authorize EPA to any enforcement action (whether by first issuing an administrative order or by going straight to court) merely because EPA disagrees with a BACT determination made by Alaska pursuant to its EPA-approved PSD program. We believe EPA's proper remedy in such a case is to appeal the state permit through the state's administrative appeal process.

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Based on cases such as *U.S. v. Solar Turbines, Inc.*, 732 F. Supp. 535 (M.D. Pa. 1989) and *U.S. v. Ford Motor Co.*, 736 F. Supp. 1539 (W.D. Mo. 1990), we do not believe EPA is authorized to collaterally attack a state permit under Section 167 in a situation such as this. Such a collateral attack is not even authorized in states without HPA-approved PSD programs, where EPA nonetheless has delegated the operation of its program to the state. Where such a delegated state issues a PSD permit and EPA disagrees with its terms, EPA's rules do not allow it unilaterally to override the state-issued permit, even though the permit was issued under the EPA's own PSD program. In such a case, EPA must appeal the state-issued permit to EPA's Environmental Appeals Board, *i.e.* take an administrative appeal rather than bringing enforcement action. In such appeals EPA has the burden of showing the state committed clear error. We see no rational basis for according any less deference to a permit issued by a state under the state's own EPA-approved PSD program.

Assuming, however, for the purpose of discussion that EPA does have authority to collaterally attack a state-issued PSD permit under Section 167, we know of no legal basis or plausible reason why EPA would be required to issue an administrative order before filing an action in the U.S. District Court or pursuing other lawful enforcement options.

The language of Section 167 authorizes EPA either (1) to issue an administrative order or (2) to file a lawsuit, in its discretion. Section 167 provides, in pertinent part, that:

The Administrator shall . . . take such measures, including issuance of an order, or seeking injunctive relief, as necessary to prevent the construction or modification of a major emitting facility which does not conform to the requirements of this part . . .

This language, by its terms, authorizes EPA either (1) to issue an administrative order, or (2) to seek injunctive relief, in the alternative. Seeking injunctive relief in court is not conditioned upon the issuance of an order, either directly or indirectly, nor is it implied. Nowhere is it stated that an administrative order is a prerequisite for injunctive relief, and there is no case, ruling, guidance or legal interpretation so holding.

The language of Section 167 is comparable to the language of Section 113 of the Clean Air Act, which authorizes EPA, if it finds that a person

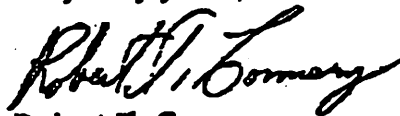
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has violated various statutory or regulatory requirements, to issue an administrative penalty order or to issue a compliance order or to bring a civil action for penalties and/or injunctive relief or to request the Attorney General to bring a criminal action. Our research reveals no case in which EPA has interpreted the pursuit of any of the disjunctive options under Section 113 to be a requisite to the pursuit of any of the other options, nor has any court so found. Given the parallel disjunctive format of Section 167, we know of no reason why EPA would have to issue an administrative order under that Section first as a condition of being able lawfully to seek injunctive relief or pursue other lawful enforcement actions.

In other enforcement cases under the Clean Air Act, EPA's choice not to first issue an administrative order has presented no bar to civil actions for penalties or injunctive relief. *See, e.g., U.S. v. AM General Corp.*, 34 F.3d 472 (7<sup>th</sup> Cir. 1994); *U.S. v. Campbell Soup Co.*, 1997 WL 258894 (E.D. Cal. 1997); *U.S. v. Ford Motor Co.*, 736 F.Supp. 1539 (W.D. Mo. 1990); *U.S. v. Stone Container Corp.*, 1999 U.S. App. LEXIS 30063 (9<sup>th</sup> Cir., 1999) (the issue before the court was whether attorneys' fees were recoverable, but the history of the case shows a lawsuit was filed by EPA without any prior administrative order).

Please feel free to forward this letter to EPA Region X. If the Region continues to be concerned about this issue, we would be pleased to discuss this further with them and attempt to come to a common understanding.

Very truly yours,



Robert T. Connery  
Lawrence E. Volmert  
OF HOLLAND & HART LLP

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